Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-871

JOHN V. TERRY and ALINE S. TERRY,
Petitioners,

vs.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation, and LEONARD M. FREIDMAN, ROBERT K. PUGLIA, and EDWIN J. REGAN, Justices of the Court of Appeal of the State of California, Third Appellate District,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Ninth Circuit is attached to the Petition for Writ of Certiorari as Appendix A. The District Court wrote no opinion. The unpublished opinion of the California Court of Appeal, Third Appellate District, is attached hereto as Appendix 1.

JURISDICTION

The judgment of the Court of Appeals was entered on November 1, 1977. Following that court's denial of a Petition for Rehearing, the Petition for Writ of Certiorari was filed December 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

Whether, under the circumstances of this case, the justices of the California Court of Appeal are immune from suit under the Civil Rights Act.

STATUTES INVOLVED

The relevant provisions of the Civil Rights Act (42 U.S.C. §1983) and the California Constitution (Art. XI, Section 4½, as amended) are set forth in the Petition for Writ of Certiorari at page 3).

The California Code of Civil Procedure provides, in part:

> "§43. [Powers of appellate court: Determination of law questions: Remittal of judgment.] The Supreme Court, and the courts of appeal, may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. In giving its decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. Its judgment in appealed cases shall be remitted to the court from which the appeal was taken.
>
> "§906. [Matters reviewable on appeals: Matters reviewable on request of respondent.] Upon an appeal pursuant to Section 904.1 or 904.2, the reviewing court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party, including, on any appeal from the judgment, any order on motion for a new trial, and may affirm, reverse or modify any judgment or order appealed from and may direct the proper judgment or order to be entered, and may, if necessary or proper, direct a new trial or further proceedings to be had. The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the reviewing court to and it may review any of the foregoing matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken. The provisions of this section do not authorize the reviewing court to review any decision or order from which an appeal might have been taken."

STATEMENT

An action was commenced by Klamath Production Credit Association (KPCA) in the California state

court to collect money due under notes made by John V. Terry and Aline S. Terry, and to foreclose upon the security for the notes. Terrys defended and cross-complained on the ground that KPCA had been guilty of fraud, deceit, undue influence and duress. The cause was tried before a jury, and a verdict in favor of Terrys was returned. Judgment was entered, and KPCA appealed to the Court of Appeal of the State of California, Third Appellate District. Three justices of the Court of Appeal considered the cause and reversed the judgment of the trial court. Basically, the Court of Appeal held that the trial court committed prejudicial error in instructing the jury and in using a verdict form which was confusing. The court pointed out that the erroneous verdict form and the erroneous instructions reflected a fundamental misconception which pervaded the entire trial; that is, the failure to separate the defense claims upon which the Terrys based their claim to cancellation of the notes and the claim of deceit upon which they based their damage action. Additionally, the court found that the trial court erred in purporting to cancel Terrys' outstanding indebtedness on the promissory notes. Finally, the reviewing court found that there was no substantial evidence, contradicted or uncontradicted, to support the jury's verdict. The cause was remanded to the trial court for a new trial.

Following the remittitur of this action to the trial court, Terrys filed this action in the United States District Court, Eastern District of California, against KPCA and the three justices who heard the appeal.

The complaint basically alleged that KPCA prosecuted an appeal "totally lacking in merit", that the defendant judges erroneously reversed the trial court's decision, and that the defendant judges "unlawfully" deprived Terrys of their property without due process of law—all to the benefit of KPCA. Terrys then removed the pending state court action to the District Court, and the two actions were consolidated in that court. KPCA moved to remand the state court action on the ground that the District Court lacked jurisdiction over the action and on the ground that the petition for removal was not timely. KPCA and the defendant judges moved to dismiss the original federal proceeding. The District Court granted the motion to remand and granted the motions to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted.

ARGUMENT

A. THE PETITION FOR WRIT OF CERTIORARI RAISES NO QUESTION REGARDING THE DISMISSAL OF KLAMATH PRODUCTION CREDIT ASSOCIATION.

KPCA moved to dismiss Terrys' civil rights action on the ground that KPCA was not charged with acting, and had not acted, under color of state law within the meaning of 42 U.S.C. §1983. The District Court granted the motion and the Court of Appeals affirmed the decision finding that the complaint was insufficient on its face and also finding that "merely utilizing the legal machinery of the state court system is not action

'under color of state law' ". (Petition for Writ of Mandate, Appendix A, p. iv.)

In their statement of questions presented to this Court, petitioners do not articulate any claim that the decisions of the District Court or the Court of Appeals were erroneous in this respect.[1] (Petition for Writ of Mandate, p. 2) Thus, the petition does not question the validity of the federal courts' actions insofar as they directly affect respondent KPCA.

B. THE CALIFORNIA COURT OF APPEAL ACTED PROPERLY AND WITHIN ITS JURISDICTION UNDER STATE LAW AND THE DEFENDANT JUDGES ARE THUS IMMUNE FROM SUIT.

The Petition for Writ of Certiorari raises the question whether justices of the California Court of Appeal are immune from suit under the Civil Rights Act (42 U.S.C. §1983) for acts done outside their jurisdiction. The question is an abstract one, however, because the judicial officers here were clearly acting within their jurisdiction.

Petitioner does not question that the appeal to the California Court of Appeal was properly before that court. Petitioners contend only that the court's consideration of certain instructions and the verdict form was improper, since these items were not specifically

[1]Although the Petition for Writ of Certiorari states "That the wrongful taking was under color of state law by the judges and Federal agency cannot be disputed", no authority whatever is offered for the statement. In fact, KPCA has disputed that it acted under color of state law from the beginning of the action.

assigned as error on appeal.[2] Since the court may decide a case on any proper points or theories, and since the instructions and verdict form were part of the record on appeal, the matters were within the purview of the court's jurisdiction. California law grants the Court of Appeal the power to review a verdict or decision in any intermediate ruling, order or decision which affects the judgment appealed from, and the court has the power to affirm, reverse or modify any judgment or order appealed from. C.C.P. §§43, 906. It thus appears that the defendant judges were acting within their judicial capacity, and that they exercised their jurisdiction within the limits of California law. The Court of Appeals also found that "[t]here is no question that the three judges in reversing the Terrys' lower Court judgment were acting within their judicial jurisdiction." (Petition for Writ of Certiorari, Appendix A, p. iv.) The judges are consequently immune from suit under 42 U.S.C. §1983. *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967).

Throughout the proceedings below, petitioner has chosen to ignore that in addition to the errors found in the instructions, the California Court of Appeal also found that there was no substantial evidence to support the trial court's judgment. Thus, notwithstanding any other error which the Court of Appeal

[2]Petitioners' bold statements that the judges "falsified the record" (Petition, p. 6) and are guilty, not of error, but of "judicial wrongdoing" (Petition, p. 8), are unsupported by any reference to the record and have no foundation, either in the record or in fact.

may have found, it was bound to reverse the judgment because petitioner had failed to sustain its burden of proof.

CONCLUSION

The question set up by the Petition for Writ of Certiorari does not exist in this case. The justices of the California Court of Appeal for the Third Appellate District clearly acted in their judicial capacity and within the jurisdiction conferred by the laws of the State of California. They are thus immune from suit under 42 U.S.C. Section 1983.

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

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January 11, 1978

(Appendix 1 Follows)

APPENDIX

Appendix 1

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
Third Appellate District

(Siskiyou)

3 Civ. 15090
(Superior Ct. No. 24951)

Klamath Production Credit Association, a corporation,
Plaintiff, Cross-Defendant and Appellant,
vs.
John V. Terry and Aline S. Terry, his wife, et al.,
Defendants, Cross-Complainants and Respondents.

[Filed Mar. 30, 1976]

OPINION

Plaintiff Klamath Production Credit Association (KPCA) is a farm credit bank with its office in Klamath Falls, Oregon. Defendants and cross-complainants John and Aline Terry were engaged in cattle raising and growing potatoes and grain in Siskiyou County. Plaintiff brought this action for the purpose of foreclosing chattel mortgages and trust

deeds given to secure promissory notes, alleging that defendants had failed to pay principal and interest of approximately $45,000, a debt resulting from operating loans to defendants totaling about $68,000. In their answer the Terrys alleged fraud, duress and breach of a confidential relationship as affirmative defenses. In their Fourth Amended Cross-Complaint they sought general and punitive damages and cancelation of the loan instruments on grounds of deceit and breach of a fiduciary relationship.

The issues raised by the cross-action were submitted to a jury, which returned a verdict finding plaintiff guilty of "deceit and undue influence" and awarding defendants $60,000 general damages and $5,000 punitive damages. The court denied plaintiff's motion for judgment notwithstanding the verdict and for new trial and entered a judgment in favor of defendants and against plaintiff for $65,000. The court then entered an additional judgment relieving defendants of any obligation to make "restitution" of sums advanced but refusing to nullify the security instruments. Plaintiff appeals. Defendants cross appeal, charging the court with error in refusing to nullify the security instruments.

In 1967 Terry was raising potatoes, grain and cattle on a ranch of about 239 acres. The California Department of Veterans Affairs held a first deed of trust on the ranch. He had been financing his agricultural operations with various banks. He had a large loan carryover and was told that he could refinance his operations only on the basis of an increased loan limit

and by selling part of his cattle herd. Terry was reluctant to sell his cattle and sought another financing source. In March 1967 he applied to KPCA for a loan which would include more than $31,000 needed to refinance his existing bank loan. KPCA rejected his loan application, suggesting, however, that once his livestock had been sold, the loan committee would be willing to consider financing his operating expenses. Terry reapplied to KPCA, offering to submit his land to a second deed of trust and stating that he wanted to run his cattle through the 1967 season. Because of the offer of additional security, KPCA approved the loan proposal. The approval was expressed in a letter dated March 31, 1967, which informed him that the loan would be subject to a first lien on his equipment and livestock, a second deed of trust on his land and an agreement whereby all cattle were to be sold by December 5, 1967, the maturity date of the loan.

The loan papers were not actually executed until May 1967 because the Veterans Affairs Department had to consent to imposition of a second trust deed on the land. At the time of executing the loan papers, Terry also signed the letter agreement to sell his cattle by the maturity date of the KPCA loan.

In 1967 Terry lost a substantial portion of his potato crop, while his grain crop was average. In November 1967, after the harvest, KPCA told Terry that he would have to sell his cattle, and that one of their members, Yrigoyen, was willing to buy the cattle. Terry was unwilling to sell his cattle but did so at

KPCA's insistence. According to Terry's testimony, a KPCA official told him that the way cattle prices were going down, he could probably replace the cattle for about the same price he was receiving.

The 1967 loan was not paid off and KPCA refinanced Terry in 1968. Although Terry requested funds to buy a new herd of cattle, KPCA would not lend him money for that purpose. Terry was unable to repay the 1967 loan out of the proceeds of the 1968 harvest and KPCA again financed him in 1969. Much of his 1969 potato crop was held in a storage cellar. In April 1970 Terry sought additional funds from KPCA to place his potatoes in cold storage. The request was rejected because, in KPCA's opinion, the potatoes had already started to sprout. Terry was unable to sell his potatoes in 1970; they deteriorated and were finally dumped.

The 1969 loan remained unpaid. During 1970 KPCA advanced Terry some living expenses. In September 1971 KPCA instituted the present lawsuit.

The trial court committed prejudicial error in submitting to the jury instructions and a verdict form which permitted the jury to award damages, general and punitive, for either or both of two seemingly different torts, fraud and deceit.[1] Fraud and deceit

[1]As submitted to the jury, the verdict form read as follows: "WE THE JURY, find for the Terrys on their cross-complaint on the grounds of _____ (here insert any or all of the following terms: Fraud, deceit, duress or undue influence) and award damages in the sum of $_____ to be paid to Terrys by Klamath Production Credit Association and punitive damages in the sum of $_____ to be paid by Klamath Production Credit Association to Terrys."

are separately defined in the Civil Code only because the former is used as one of the grounds for voiding (i.e., by cancellation or rescission) an apparent consent to contract (Civ. Code, §§ 1567, 1571-1573), and the latter is used to define the actionable tort (Civ. Code, §§ 1709-1710). As descriptions of an actionable tort, the words "fraud" and "deceit" are tautological. In a strict sense, acts of fraud give rise to the actionable wrong called "deceit." (See 4 Witkin, Summary of California Law, pp. 2710-2711.)

The instructions and the verdict form submitted to the jury the question whether a tort (deceit) had been committed, but utilized two separate definitions and two separate words as though they described two separate torts, either of which could be separately considered by the jury and either of which could be selected as the basis of a damage award. The instructions and verdict form had a natural tendency to create a jury belief that KPCA might be guilty of something other than fraud, i.e., deceit.

The error was demonstrated and accentuated by the jury's disposition of the alternatives presented to it. The jury entered the words "deceit and undue influence" in the blank space provided. By implication the jury rejected the alternative called "fraud" and accepted the alternative called "deceit." The verdict, as returned by the jury, was self-contradictory.

Moreover, the court erred by submitting to the jury the issue of undue influence, as though this were an actionable tort for which damages could be awarded. Undue influence is a ground for voiding a contract.

(Civ. Code, §§ 1567, 1575.) It is not an actionable tort for which damages may be awarded. (Campbell v. Birch, 19 Cal.2d 778, 791; Bancroft v. Bancroft, 110 Cal. 374, 378.)

Appeals do occur where errors in jury instruction dwindle into relative harmlessness in the light of the entire array of instructions. Here the array of instructions accentuated the error. The erroneous verdict form and the erroneous instructions reflect a fundamental misconception which pervaded the entire trial—the failure to separate the defense claims upon which the Terrys based their claim to cancelation and the claim of deceit upon which they based their damage action.

It is true that the two remedies overlapped to some extent for—to the extent that both were predicated on fraud—they depended upon the same proof. The Terrys' cross-action for the tort of deceit was based upon an affirmance of the contract; their cross-action for cancelation on a disaffirmance. (Brockway v. Heilman, 250 Cal.App.2d 807, 811.) The two remedies were inconsistent, and at some point prior to judgment the Terrys would have to elect between these inconsistent remedies. (Davis v. Rite-Lite Sales Co., 8 Cal.2d 675, 678-679; Paularena v. Superior Court, 231 Cal.App.2d 906, 914-915.) Under proper instructions, the jury could find for or against the Terrys on the deceit issue and that finding would be determinative of the issue for the purpose of fraud as a ground of cancelation. (See Paularena v. Superior Court, supra, 231 Cal.App.2d at pp. 914-916; Bank of

America v. Lamb Finance Co., 145 Cal.App.2d 702, 706-707.)

That circumstance, however, did not permit the court to submit both deceit and fraud to the jury as separate actionable wrongs, either of which could serve as the basis for a damage award. Deceit, as defined in Civil Code sections 1709-1710, was the proper issue to submit to the jury as the basis for an award of damages. Fraud, duress or undue influence (as enumerated in Civil Code section 1567 and defined in the following sections) were not. The latter were pleaded defensively only, that is, as grounds of cancelation, and not as the basis for a damage award. The instructions and verdict form were prejudicial, for they permitted the jury to award damages on grounds not substantively cognizable as substantive torts.

KPCA charges the trial court with error in purporting to cancel defendants' outstanding indebtedness on their promissory notes. We fully agree. Defendant's cross-complaint sought cancelation of the notes and security instruments. To cancel a contract means to abrogate so much of it as remains unperformed; it differs from rescission, which seeks to restore the parties to their original positions. (Civ. Code, § 1688; Young v. Flickinger, 75 Cal.App. 171, 174.) Ordinarily, restoration or an offer to restore consideration is a prerequisite to cancelation. (Fleming v. Kagan, 189 Cal.App.2d 791, 796.) Obviously the Terrys were in no position to tender restoration of the money they owed KPCA. The general rule demanding restoration of

consideration is subject to exception where the injured party's inability to repay was the natural result of the other party's wrong or where he claims damages in excess of what he owes. (Boyd v. Lancaster, 56 Cal.App.2d 103, 110; Peterson v. Wagner, 52 Cal.App. 1, 12; see also, Rosemead Co. v. Shipley Co., 207 Cal. 414, 420-421.) Thus the Terrys could get into court and could maintain their cross-complaint for cancelation, without first offering to restore consideration, providing that they ultimately did so. When the case arrived at the point where the court could adjust the respective equities, i.e., by setting off the principal and interest against the damage award, the court failed to do so.

Defendants contend that KPCA "used" the loan money to "destroy" defendants' farming operations. At this point defendants stoutly ignore the fact that they themselves spent the borrowed money. Having been awarded tort damages based upon the contract's affirmance, defendants were not entitled to damages consequential to a disaffirmance. (Brockway v. Heilman, supra.) The court's cancelation of the debt did not fulfill its obligation to eliminate inconsistent items of recovery. (See Civ. Code, § 1692.) By relieving Terry of the duty of "restitution" to KPCA, the court in effect increased the jury's damage award.

Additionally, the court was inconsistent in canceling defendants' unpaid debt to KPCA but refusing to set aside the security interests. The latter stood or fell with the debt.

A major contention raised by KPCA is insufficiency of the evidence to support the jury's finding of deceit. The reviewing court's power begins and ends with the determination that there is substantial evidence, contradicted or uncontradicted, to support the verdict; the appellant (KPCA) must demonstrate that there is no substantial evidence supporting the verdict. (Stevens v. Parke-Davis & Co., 9 Cal.3d 51, 64.)

The elements of fraud which give rise to the tort action of deceit are (1) misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) resulting damage. (4 Witkin, Summary of California Law, p. 2711.) The cross-complaint alleges that kind of fraud which consists of a promise without any intention to perform. (See Civ. Code, § 1710, subd. 4.)

Any rational view of the controversy commences with recognition that KPCA was in the agricultural financing business; that it was entitled to attach conditions to loans or proposed loans; that a would-be borrower could accept or reject such conditions; that, in the absence of contract, KPCA was under no obligation to lend new money or to refinance Terry or any other customer.

Each time Terry borrowed money from the bank he was made fully aware of all conditions and demands attached to the loan. Terry points to no evidence that he was induced to borrow money in reliance on false representations or concealed conditions. His cross-complaint alleges that KPCA represented that it

would continue to provide him with operating capital until his farm produced enough profit to repay the loans. His appeal brief no longer pursues that claim. According to his brief, the gravaman of his damage claim is: (a) that KPCA induced him to sell his cattle by promising to finance acquisition of a new herd; (b) that KPCA had no intent to fulfill that promise; (c) that KPCA refused to finance his acquisition of a new herd; (d) that KPCA forced him to sell his 1967 and 1969 potato crops at a loss. At this point we scrutinize the record for the fraud which produced this damage.

Where a promise to do something is made without any intention to perform it, there is an implied misrepresentation of fact; it is a difficult matter to prove the original lack of intention to perform; nevertheless, circumstantial evidence of subsequent conduct is admissible and may be sufficient. (4 Witkin, Summary of California Law, pp. 2717-2719.)

As is our obligation, we have focused on the evidence designed to support the jury's implied finding that KPCA made promises without the intention to perform. The Terrys point out that their loan application to KPCA was motivated by the unwillingness of past financing sources to provide loans to carry their cattle operation. That circumstance is of no relevance, for KPCA too rejected Terry's initial cattle financing proposal. When his second application was accepted, the loan was accompanied by an express letter agreement that all cattle were to be sold by December 5, 1967, the maturity date of the loan. Terry

claims no ignorance of this condition. Terry points to no evidence of a commitment by KPCA officials that they would refrain from enforcing the cattle sale agreement. His testimony describes no more than a hope or expectation that if he had a profitable harvest, he might be able to avoid sale of his cattle.

Only with the events of November 1967 do we arrive at the events forming the main thrust of the fraud claim. By that time, according to Terry's testimony, he had lost about half of one stand of seed potatoes, "so naturally, my crops was [*sic*] reduced quite a bit." At that time Terry entered into conversations with Don Krider, an official of KPCA. It is Kriden whom Terry accuses of promises devoid of intent to fulfill. According to Terry's testimony, he told Krider whom Terry accuses of promises devoid of innormal sale time for his potato crops, that is, January 15 or thereafter. Krider refused and insisted that Terry sell his cattle by the agreed date and said he had a buyer, one Yrigoyen. A vital excerpt of Terry's testimony is appended in the margin.[3] Accordingly,

---

[3]"A. He told me that the way the cattle price looked that they were going to go down and that I'd probably save the feed and would probably get the cattle for about the same price I sold these for possibly, if not cheaper, and that way we would replace the herd in 1968.

"Q. What did you tell him in response to that?

"A. I told him I'd rather keep my own cattle because I knew what they were.

"Q. What did he say specifically, as close as you can, with respect to replacing your cattle in 1968?

"A. Well, that's just about the substance of it right there. He told me that they would replace them in 1968."

At another point of the transcript, Terry repeated his testimony that Krider said the bank would replace the cattle in 1968. The repetition, however, was stricken from the record.

Terry sold his cattle to Yrigoyen. The price to all appearances was a fair one.

The jurors were the sole judges of credibility. As is required on appeal, we disregard conflicting evidence and accept at face value Terry's testimony that Krider told him KPCA would replace (i.e., finance) a new cattle herd in 1968. The jury could reasonably infer that Krider's statement, as described by Terry, amounted to a promise. When, in 1968, Krider declined to lend him money for that purpose, the jury could infer that Krider had made his 1967 promise without any intention of performing it. (Santoro v. Carbone, 22 Cal.App.3d 721, 728.) Krider, moreover, had testified that KPCA had no intention of financing Terry's cattle operations.

Recovery for deceit requires proof of reliance upon the alleged misrepresentation. (Civ. Code, § 1709; Slakey Bros. Sacramento Inc. v. Parker, 265 Cal.App.2d 207-208.) A promise made with no intention of performance is actionable fraud where the other party relies upon it as an inducement to enter into a transaction. (Brockway v. Heilman, supra, 250 Cal.App.2d at p. 811.) Having established a misrepresentation, it became incumbent upon cross-complainants to establish the element of reliance. At this point their proof fails altogether.

In selling his cattle in November 1967, Terry was doing nothing more than he had promised to do when he accepted the bank loan and agreed to sell his cattle by December 5, 1967. The lender had a contractual right to insist that he perform that commitment.

Terry had no right to refuse. Indeed, his refusal would have placed him in breach of contract and would have exposed him to foreclosure of the security instruments he had given KPCA. According to all the evidence, he sold his cattle at his creditor's insistence and not because he was persuaded, i.e., induced, to do so by the creditor's promise to lend him more money for a new cattle herd in 1968.

Closely related to the element of reliance is the factor of materiality, that is, the misrepresentation must be the inducing cause of the action. (See Vai v. Bank of America, 56 Cal.2d 329, 352.) In the analogous area of fraud as a ground of rescission, the courts have rejected findings of fraud where the misrepresentation was not the inducing cause of the contract. " 'The misrepresentation, it is true, need not be the sole cause of the contract, but it must be of such nature, weight, and force that a court can say "without it the contract would not have been made." ' " (Greenawalt v. Rogers, 151 Cal. 630, 635.) Terry was bound to sell the cattle by force of his loan agreement regardless of Krider's described promise to lend new money for a replacement herd in 1968. Under these circumstances, the verdict cannot stand. (Greenawalt v. Rogers, supra, 151 Cal. at p. 637.)

The Terry brief charges KPCA with "double-dealing" in having Terry sell his cattle to Yrigoyen, another KPCA borrower. Apparently the statement is made to create an inference that KPCA was motivated by a desire to provide profit to Yrigoyen and impose loss on Terry. Such innuendo is no substitute

for references to concrete evidence of actionable fraud. There is no evidence that KPCA insisted that Yrigoyen be given an exclusive right to buy Terry's cattle, no evidence that Terry could not have sold his cattle elsewhere if he chose. Indeed, Terry admitted that Yrigoyen paid him about what he might have received at auction.

Terry charges KPCA with "gross bad faith" in the spring of 1968 by demanding that Terry sell 18,000 sacks of potatoes at a loss of $2 per sack. Also, in some unspecified fashion, KPCA is charged with Terry's loss of $55,000 on his 1969 potato crop. The Terry brief declares: "Thus the Terrys were being liquidated while they thought they were operating." These claims point to no fraud whatever. They represent accusations made without any reference to specific misrepresentations or reliance upon misrepresentations.

The jury's verdict was based upon the alternative ground of undue influence. There is no evidentiary support for the finding of undue influence. In order to constitute duress or undue influence a threat must be unlawful or false. (Leeper v. Beltrami, 53 Cal.2d 195, 204; Miller v. Walden, 53 Cal.App.2d 353, 361.) A threat to exercise a legal right is not duress or undue influence. (Leeper v. Beltrami, supra; Konecko v. Konecko, 164 Cal.App.2d 249, 252.) The trial record shows no evidence whatever of duress or undue influence in the legal sense of these terms.

Both judgments, of course, must be reversed. It is questionable whether the Terrys can muster evidence

establishing the elements of fraud, duress or undue influence as sufficient grounds for avoiding their unpaid debt; or that they can establish the substantive tort of deceit. We have reviewed their fourth amended cross-complaint. It suffices to avoid a general demurrer only because of an allegation that KPCA represented to the Terrys that it would provide operating capital until their agricultural operations produced sufficient income to repay all sums loaned. What motive KPCA might have for making such representations or promises is a mystery which Terry does not explain. Thus far, there is no substantial evidence in support of that allegation. However, we find no basis for denying the Terrys an opportunity for a new trial in the unlikely event that they may be able to prove that allegation.

Judgments reversed. Costs on appeal will be borne by defendants and cross-complainants Terry.

Friedman J.

We concur:

Puglia P.J.

Regan J.